UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIMBERLEY A. SMITH, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C09-1582-RSL REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Kimberley Smith proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1961.[1] She graduated from high school. (AR 26.) Plaintiff previously owned and managed a small retail business and worked briefly as a bartender. (AR 27, 30, 122.)

Plaintiff filed applications for DIB and SSI in June/July 2006. (AR 110-16, 129.) She alleged disability beginning March 1, 2003 due to post-traumatic stress disorder (PTSD), depression, and anxiety. (AR 58, 110.) Her applications were denied at the initial level and on reconsideration, and she timely requested a hearing.

On March 9, 2009, ALJ Mattie Harvin-Woode held a hearing, taking testimony from plaintiff and vocational expert Mark Harrington. (AR 20-53.) On April 10, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR 8-19.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on September 21, 2009 (AR 1-4), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.[2]

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

2 Plaintiff's Opening Brief contains a lengthy Statement of Facts. In fact, plaintiff does not commence the argument portion of her brief until page twelve. The parties are reminded that such a recitation of the facts is unnecessary and, in fact, is discouraged. Rather, a discussion of the relevant facts and portions of the administrative record should be conducted in the context of specific assignments of error.

whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found that plaintiff did not engage in substantial gainful activity from her alleged onset date through her date last insured, December 31, 2010.

At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's high blood pressure, anxiety disorder, PTSD, and bipolar disorder severe. He found other alleged impairments, such as migraines and symptoms associated with mold exposure, not severe.

Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ concluded plaintiff did not have an impairment or combination of impairments that met or medically equaled a listing.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform a full range of work at all exertional levels, but with the nonexertional limitation to unskilled work. With this RFC, the ALJ found plaintiff unable to perform any past relevant work.

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. With the assistance of the vocational expert, the ALJ found plaintiff able to perform other jobs, such as work as a janitor or production assembler.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred in consideration of various medical opinions, in assessing her testimony and RFC, and in reaching the conclusion at step five. She requests remand for an award of benefits. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed.

Medical Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

"The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Id*. at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) and *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984)). However, "the report of a nonexamining, nontreating physician need not be discounted when it 'is not contradicted by *all other evidence* in the record.'" *Andrews v. Shalala*, 53 F.3d 1035, 1041(9th Cir.1995) (quoting *Magallanes*, 881 F.2d at 752 (emphasis in original)).

The ALJ may reject physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ "must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

"Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See, e.g.*, *Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations is sufficient to meet or equal [a listing.]"); *Smolen v.*

Chater, 80 F.3d 1273, 1292 (9th Cir. 1996) (ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony legally insufficient; finding record fully developed and disability finding clearly required).

However, courts retain flexibility in applying this "'crediting as true' theory." *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true). As stated by one district court: "In some cases, automatic reversal would bestow a benefits windfall upon an undeserving, able claimant." *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

A. Examining and Non-examining Physicians

Plaintiff challenges the ALJ's assessment of opinions from consultative examiner Dr. Peter Moore and non-examining psychologist Dr. Alex Fisher. She points to Social Security Ruling (SSR) 96-5p as providing that "adjudicators must always carefully consider medical source opinions about any issue, including opinions about issues that are reserved to the Commissioner[,]" and that such opinions "must never be ignored." *See also* SSR 96-8p ("The RFC assessment must always consider and address medical source opinions.") and SSR 96-6p (opinions of State agency physicians and psychologists must be considered). Plaintiff asserts that an ALJ is prohibited from "cherry picking" the evidence by only accepting the portions of medical opinions supportive of the ALJ's conclusions. *See, e.g.*, *Gallant*, 753 F.2d at 1455-56 (ALJ "cannot reach a conclusion first, and then attempt to justify it by ignoring competent

evidence in the record that suggests an opposite result.") (cited source omitted). She argues that, given the errors in relation to examining physician Dr. Moore, the omitted opinions from this physician must be created as true.

Dr. Moore examined plaintiff in October 2006. (AR 308-10.) The ALJ assessed Dr. Moore's opinions as follows:

> . . . Dr. Moore opined that the claimant could understand and follow simple directions without difficulty and moderately complex instructions with some difficulty. Dr. Moore indicated the claimant's anxiety would interfere with her ability to interact appropriately with others and she would likely have considerable difficulty responding to work pressures or changes in her routine. Although Dr. Moore indicated the claimant's anxiety would interfere with her ability to interact appropriately with others and with her ability to respond to work pressures or changes in her routine, he did not indicate that these abilities were precluded. Dr. Moore's opinions are consistent with the objective evidence of record as well as the claimant's own reports of her daily activities. Accordingly, the undersigned gives Dr. Moore's opinions great weight.

(AR 16-17; internal citation to record omitted.)

Plaintiff contends the ALJ inappropriately cherry picked the evidence from Dr. Moore, essentially ignoring his opinions as related to her ability to interact with others and withstand work pressures and changes. She asserts that a person whose anxiety interferes with her ability to interact with others is effectively precluding from interacting with others, while a person who would have considerable difficulty responding to work pressures and changes would need to avoid such situations in the work place. Plaintiff also asserts that the ALJ failed to address Dr. Moore's observations that "when calm, she can mentally manipulate information and recall material for brief periods[,]" and that her anxiety will "make her ability to persist at tasks, especially those requiring sustained concentration[,] quite variable[.]" (AR 310.) Plaintiff takes note of the fact that Dr. Moore never opined that she could return to work, assessed her

prognosis as only fair, and opined that "[h]er current cognitive problems are at least in part psychologically based[,]" while noting various factors, such as an abusive upbringing, loss of her business, the deaths of her sister and mother, and her health issues. (*Id*.)

The Commissioner denies the allegation of cherry picking, pointing to the ALJ's extensive discussion of Dr. Moore's observations and findings throughout the decision. (AR 11-13.) (*See also* Dkt. 13 at 8-9 (documenting each mention of Dr. Moore's observations and findings in the ALJ's decision).) The Commissioner observes that, for example, in addition to Dr. Moore's findings with respect to plaintiff's anxiety, the ALJ took note of Dr. Moore's finding that plaintiff had a Global Assessment of Functioning (GAF) of 55, suggesting moderate symptoms. The Commissioner stresses that an ALJ need not discuss all the evidence presented, so long as he explains why "significant probative evidence has been rejected." *See generally Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citing *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)). He argues that plaintiff inappropriately reads Dr. Moore's use of the term "interfere" as meaning "preclude," and asserts that Dr. Moore merely found plaintiff's abilities in interacting with others and withstanding work pressures and changes hindered, not precluded.

Dr. Fisher, a State agency reviewing psychologist, assessed plaintiff in October 2006. (AR 313-30.) The ALJ considered Dr. Fisher's opinions as follows:

> [Dr. Fisher] opined that the claimant was able to complete simple instructions and could perform complex tasks, but indicated her anxiety would interfere somewhat with her ability to sustain concentration, persistence and pace. Dr. Fisher further opined that the claimant was likely to have some trouble responding to work pressures or routine changes. Although Dr. Fisher did not examine the claimant, and therefore his opinions do not as a general matter deserve as much weight as those of examining or treating physicians, those

> opinions do deserve some weight, particularly in a case like this in which there exist a number of other reasons to reach similar conclusions (as explained throughout this decision). It should also be noted that Dr. Fisher reviewed the medical evidence objectively, and would be unlikely to be sympathetic or prejudiced toward the interests of the claimant. For all of these reasons, substantial weight has been given to the determinations [of] Dr. Fisher.

(AR 17; internal citation to record omitted.)

Plaintiff notes that, like Dr. Moore, Dr. Fisher did not opine that she could return to work. She asserts that the ALJ failed to address a number of Dr. Fisher's opinions. She points to, *inter alia*, Dr. Fisher's findings of a variety of "moderate" limitations in work-related functions, his observation that she could "perform complex tasks with some difficulty[,]" that her "anxiety will interfere somewhat with her ability to sustain CPP [concentration, persistence, and pace], and that she is "[l]ikely to have some trouble responding appropriately to work pressures or routine changes." (AR 313-15.)

The Commissioner notes that the ALJ acknowledged the limitations assessed by Dr. Fisher. (AR 17.) He concedes that the ALJ failed to add the qualifying words, "with some difficulty" (AR 315), to Dr. Fisher's opinion with regard to complex tasks, but contends this omission was harmless given the limitation to unskilled work and the acknowledgment of Dr. Moore's similar finding (AR 14, 16). *See Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless error in Social Security context where a "mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion.") The Commissioner further notes that the findings from Dr. Fisher highlighted by the ALJ came from Dr. Fisher's narrative summary. Finally, in regard to plaintiff's observation that neither Dr. Fisher, nor Dr. Moore opined that plaintiff could return

to work, the Commissioner notes that neither physician opined that plaintiff could *not* return to work and that, in any event, the decisions as to a claimant's RFC and ability to work are reserved to the Commissioner. SSR 96-5p.

Plaintiff's focus on the absence of an express opinion from these physicians that she could return to work is unavailing. "Disability," for the purposes of the Social Security Act, is a vocational concept based on a medical foundation. *See generally* 20 C.F.R. §§ 404.1505(a), 416.905(a) ("The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months.") It is beyond a physician's expertise to say whether or not a claimant seeking disability benefits can or cannot work. §§ 404.1527(e)(1), 416.927(e)(1) ("We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are 'disabled' or 'unable to work' does not mean that we will determine that you are disabled."); SSR 96-5p (medical source opinions as to whether someone is "'disabled' or 'unable to work'" cannot be disregarded, but are not "entitled to controlling weight or [to be] given special significance" since those determinations are reserved to the Commissioner).

However, plaintiff does identify reversible error in the ALJ's assessment of the opinions of Drs. Moore and Fisher. Dr. Moore found that plaintiff's anxiety would interfere with her ability to interact appropriately with others, while Dr. Fisher, in discussing social interaction, found that plaintiff's "anxiety increases in unfamiliar environments[,]" that she "can be

tangential and mildly inappropriate[,]" but was "pleasant and cooperative with logical and coherent speech once she relaxed during the interview." (AR 310.)[3] Both Drs. Moore and Fisher opined that plaintiff's anxiety would interfere with or cause difficulty in her ability to respond to work pressures or changes, and her abilities in relation to concentration, persistence, and/or pace. (AR 310, 315.) Likewise, both physicians identified difficulties with complex or detailed instructions. (*Id.*)

The ALJ acknowledged most of the physicians' findings, accorded their opinions great and substantial weight, but failed to account for any assessed limitations in the RFC or, in all but one respect, to distinguish the jobs identified at step five as not requiring skills in the areas in question. The ALJ did, at step five, state that "the jobs identified by the vocational expert generally do not require frequent contact with coworkers or the general public[,]" and concluded that, "[t]herefore, any impairment in inability to interact with others would not preclude plaintiff from performing the jobs identified by the vocational expert." (AR 18.) However, there is no testimony from the vocational expert on this issue. (*See* AR 50-52.) Also, while the limitation to unskilled work may account for the physicians' opinions as to complex or detailed instructions, both of the jobs identified at step five require level two "reasoning development," which is defined as the ability to: "Apply commonsense understanding to carry out *detailed but uninvolved* written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations." Dictionary of Occupational Titles (DOT), App. C (emphasis added).

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3 Dr. Fisher identified moderate limitations in social interactions and functioning in the "check box" portions of forms completed. (AR 314, 327.) However, an ALJ properly focuses on the narrative portion of the Mental RFC Assessment (MRFCA) form (AR 315), rather than check boxes on the form. *See* Program Operations Manual System (POMS) DI 25020.010 at B.1.

The Commissioner correctly avers that opinions as to difficulties or interferences should not be read to mean that an individual is precluded from working due to such limitations. However, the ALJ in this case erred in not either accounting for the difficulties or interferences assessed or in providing sufficient reasoning for the decision to reject the opinions as to those assessments. In sum, the ALJ failed to explain why significant probative evidence had apparently been rejected. *See Vincent*, 739 F.2d at 1394-95.

At the same time, plaintiff fails to establish that the record supports crediting examining physician Dr. Moore's opinions as true. That is, plaintiff does not establish that, by crediting as true Dr. Moore's opinions as to her difficulties with or interferences in relation to work functions, the evidence supports a finding of disability. *See, e.g.*, *Schneider*, 223 F.3d at 976; *Smolen*, 80 F.3d at 1292. Instead, the ALJ should be required to reconsider both Dr. Moore's and Dr. Fisher's opinions on remand.

B. Treating Physicians

Plaintiff challenges the ALJ's decision to give little weight to opinions from her treating physicians, Drs. LuAnn Chen and Mary Bartels, rendered in March and November 2006 respectively. (AR 202-03, 372-73.) The ALJ's consideration of these opinions reads as follows:

> In a March 16, 2006 statement, Dr. Chen opined that due to the claimant's severe depression and posttraumatic stress disorder, the claimant could not perform full time job search activities, part time job search activities, full time employment, or part time employment.
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> In a November 30, 2006 statement, Mary Bartels, M.D., indicated that the claimant's bipolar disorder limited her ability to work due to markedly diminished concentration and inability to interact appropriately with coworkers, and opined that the claimant was completely unable to work permanently.

> It would appear that Dr. Chen and Dr. Bartels relied quite heavily on the subjective report of symptoms and limitations provided by the claimant, and seemed to uncritically accept as true most, if not all, of what the claimant reported. Yet, as explained above and elsewhere in this decision, objective medical findings do not support the extent of limitation alleged by the claimant. For these reasons, the undersigned gives little weight to the opinions of Dr. Chen and Dr. Bartels.

(AR 16; internal citations to record omitted.)

Plaintiff asserts that the ALJ erred in rejecting his treating physicians' opinions where there is no evidence they uncritically accepted her complaints, and both physicians referenced their observation of signs, as opposed to reported symptoms, of her mental impairments. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) ("An ALJ may reject an examining physician's opinion if it is contradicted by clinical evidence. . . . But an ALJ does not provide clear and convincing reasons for rejecting an examining physician's opinion by questioning the credibility of the patient's complaints where the doctor does not discredit those complaints and supports his ultimate opinion with his own observations."; finding nothing in the record suggesting physician disbelieved claimant's description of symptoms or relied on those descriptions more heavily than his own clinical observations) (cited sources omitted). She points to a variety of signs identified by these physicians. (*See* AR 374 (Dr. Bartels noted, on November 16, 2006, that plaintiff was "rambling, irritable, circumstantial and labile on the phone."); AR 213 (Dr. Bartels, on June 28, 2006, observed that plaintiff was "slightly unkempt; rambling; not as pressured; illogical; labile; dysphoric; grandiose[.]"); AR 217 (in a May 31, 2006 evaluation, Dr. Bartels observed rapid, loud, and pressured speech, labile effect, dysphoric mood, and circumstantial thought process, and described plaintiff as presenting in a

"dysphoric state with many manic symptoms."); and AR 402 (on October 8, 2007, Dr. Chen noted, *inter alia*, that plaintiff was "less tangential than in the past[]" and that she had a "[m]ildly depressed mood and affect[.]")) (*See also* AR 385, 387, 391, 402 (Dr. Chen noted diagnoses of insomnia and bipolar depression).) Plaintiff describes her treating physicians' opinions as uncontradicted and avers that, given the absence of clear and convincing reasons for their rejection, the opinions should be credited as true.

The Commissioner denies that the opinions of Drs. Chen and Bartels were uncontradicted, pointing to the opinions of Drs. Moore and Fisher. The Commissioner further denies that the ALJ rejected the opinions of Drs. Chen and Bartels, noting that the ALJ did find plaintiff's anxiety, PTSD, and bipolar disorder severe, and asserts that the ALJ, instead, gave little weight to the opinions of these physicians that plaintiff was unable to search for or hold a job. The Commissioner stresses that the ALJ is the final arbiter with respect to resolving conflicts in the medical record, *Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008), and that the decision as to a claimant's RFC and ability to work is one reserved to the ALJ, SSR 96-5p.

Plaintiff's arguments as they relate to Dr. Chen are not persuasive. Dr. Chen's March 2006 report containing an opinion as to plaintiff's inability to perform or search for employment is a "check box" form lacking any significant discussion. (AR 202-03.)[4] "The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings." *Thomas*, 278 F.3d at

4 As observed by the Commissioner, while the ALJ did not make a note of this fact and its consideration would be an improper post hoc rationalization, Dr. Chen indicated on the form that it could "not definitely be determined" at that time whether she would recommend plaintiff pursue Social Security or other disability benefits, and stated: "Should be determined after full psychiatric evaluation." (AR 203.)

957. *See also Batson v. Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004) (a treating physician's opinions may be discounted when it is "in the form of a checklist, did not have supportive objective evidence, was contradicted by other statements and assessments of [the claimant's condition], and was based on [the claimant's] subjective descriptions of pain[,]" as well as when that opinion is "conclusory, brief, and unsupported by the record as a whole . . . or by objective medical findings[.]")

The document relied on by plaintiff as reflecting Dr. Chen's observation of signs supporting his opinions is dated *after* the March 2006 report containing those opinions. (AR 402.) Moreover, that document provides support for the ALJ's assessment of Dr. Chen's opinions in describing plaintiff as *less* tangential and with only *mildly* depressed mood and affect. (*Id*.) Plaintiff also neglects to note that Dr. Chen, at that time, also observed that plaintiff had coherent speech and "normal mentation[,]" that she was alert and oriented, and followed up the observation as to mildly depressed mood and affect by noting that plaintiff was "more hopeful than in the past." (*Id*.) As asserted by the Commissioner, the only other documents plaintiff cites in relation to Dr. Chen reflect plaintiff's history of diagnoses, rather than the observation of any signs of her mental impairments. (AR 385, 387, 391, 402.) Also, in addition to the specific reasoning offered in relation to Dr. Chen's March 2006 report, the ALJ's credibility assessment cites a number of medical records from Dr. Chen reflecting positive observations on plaintiff's mental health that contradict plaintiff's self assessment. (AR 15.) In sum, the ALJ offered sufficient reasons for rejecting Dr. Chen's March 2006 opinions as to plaintiff's inability to perform or search for work.

Plaintiff's argument with respect to Dr. Bartels is more compelling. The November

2006 report from Dr. Bartels addressed by the ALJ contains slightly more explanation than Dr. Chen's March 2006 report. (AR 372-73.) More importantly, as argued by plaintiff, the record reflects Dr. Bartels' observation of signs of plaintiff's mental impairments. Two weeks prior to the November 2006 report, Dr. Bartels described plaintiff as "rambling, irritable, circumstantial and labile[.]" (AR 374.) On June 28 2006, Dr. Bartels observed that plaintiff was "slightly unkempt; rambling; not as pressured; illogical; labile; dysphoric; grandiose[.]" (AR 213.) In May 2006, Dr. Bartels observed rapid, loud, and pressured speech, labile effect, dysphoric mood, and circumstantial thought process, and described plaintiff as presenting in a "dysphoric state with many manic symptoms." (AR 217-18 (also stating: "Ct. presented as grandiose in addition to loud, pressured, labile, circumstantial with flight of ideas."))

The Commissioner unsuccessfully minimizes these observations by Dr. Bartels. For instance, the Commissioner notes that, in the May 2006 treatment note, Dr. Bartels indicated he was starting plaintiff on a trial of Geodon, to be continued through her primary care provider, and that Dr. Chen, on June 19, 2006, reported: "Feels better on geodon. Thoughts under control. Sleeping better. Less depressed. . . . [S]table on geodon." (AR 246-47.) However, shortly thereafter, on June 28, 2006, Dr. Bartels reflected that, while plaintiff initially felt improvement on Geodon, she had tapered herself off the medication due to a variety of side effects (things were racing too fast, heart was beating too fast, agitation, body slowing down, nausea and vomiting), and Dr. Bartels observed the continued signs of mental impairment as reflected above. (AR 213.) The Commissioner also distinguishes the early November 2006 observations of Dr. Bartels by noting that that same note reflects situational stressors, such as plaintiff being flooded out of her apartment, and the fact that plaintiff was unable to get her

medications. (AR 374.) However, while true, these distinguishing factors do not negate the fact that Dr. Bartels did in this instance and previously observe signs of plaintiff's mental impairments. Nor did Dr. Bartels say that plaintiff's symptoms would improve when the situational stressors subsided.

"An ALJ may reject a treating physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citing *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989))). In this case, the ALJ gave little weight to the opinions of Drs. Chen and Bartels upon concluding that they relied "quite heavily" on plaintiff's reports of her symptoms and limitations, and that the objective medical findings in the record did not support the extent of limitation alleged. (AR 16.) It should be noted that the ALJ did not ignore the observation of signs by Dr. Bartels and, in fact, described the May 2006 observations in detail. (AR 11.) Nor did he necessarily err in concluding that Dr. Bartels' opinions appear to have been based, in part, on plaintiff's subjective reporting of her symptoms. However, given that the record contains several different treatment notes confirming Dr. Bartels' consideration of objective signs of impairment, the ALJ's explanation with respect to Dr. Bartels is deficient.

Yet, as with Dr. Moore, plaintiff fails to establish that Dr. Bartels' opinions should be credited as true. While the ALJ's explanation for his rejection of Dr. Bartel's opinions is lacking, his finding is not wholly without support. *See, e.g., Barbato*, 923 F. Supp. at 1278. Nor is it clear that the record is fully developed and a disability finding clearly required. *See, e.g., Smolen*, 80 F.3d at 1292. Accordingly, the ALJ should be required to reconsider Dr.

Bartels' opinions on remand.

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ found that, while her impairments could reasonably be expected to cause some of the symptoms alleged, plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms were not credible to the extent inconsistent with the assessed RFC. (AR 15.) The ALJ explained her conclusion as follows:

> The overall record and objective medical evidence do not support the alleged severity of the claimant's symptoms and limitations due to her impairments. Treatment notes dated 2004 to 2006 from Swedish Physicians Pine Lake

indicated that the claimant was depressed in 2003 following a house fire, but the depression was successfully treated with Effexor. At an evaluation at Swedish Physicians Pine Lake on September 30, 2003, the claimant reported her mood continued to do well, she was exercising and eating healthy, she was attending a church group, and she felt she was in control; the treating health care provider indicated the claimant's major depressive disorder/mixed anxiety was responding well to current treatment. At a June 19, 2006 examination with Dr. Chen, the claimant reported she felt better on Geodon, her thoughts were under control, she was sleeping better, and she was less depressed; Dr. Chen indicated the claimant's bipolar depression was stable on Geodon. At an April 13, 2006 examination with Dr. Chen, the claimant reported her depression and bipolar disorder were much better and she had quit taking Effexor and Depakote.

As noted above, at the October 2006 evaluation with Dr. Moore, the claimant was able to spell the word *world* forward and backward, could subtract nine from 16, could recite the days of the week and months of the year backward, could immediately recall 3/3 words and 2/3 words after five minutes, and was able to recall eight digits forward and three digits backward; Dr. Moore indicated the claimant's level of intellectual functioning was estimated to be in the average range. Dr. Moore also noted that although the claimant was receptive to and had had a positive therapeutic experience in the past, she was not receiving psychotherapy at the time of the evaluation, which further undermines the claimant's credibility regarding her symptoms and limitations. In treatment notes from Dr. Chen dated October 2007 to November 2007, the claimant reported she traveled to California for three months, went to NASCAR, and got a job working as a bartender. Treatment notes from Sound Mental Health dated June 2007 to February 2008 indicate the claimant traveled by train from Washington to California with her daughter, and handled the experience well.

Additionally, in spite of the claimant's testimony that she could not fulfill her obligations in her job as a bartender and in her teaching position with Sound Mental Health, the record does not support those allegations. In December 2007, the claimant indicated she began working as a bartender four nights per week. In addition to bartending, she also closed the bar at night including the cash out and the physical lockup of the building. Records indicate her boss told her she was "doing the best job of all the bartenders." The treating healthcare provider indicated the claimant's stressors were socioeconomic and family issues; she consistently indicated that the claimant was "doing well" and her mood was stable with treatment.

As noted above and throughout this decision, the claimant reported a range of activities which is inconsistent with the alleged severity of her impairments. In

> a February 10, 2007 Function Report, the claimant reported she was able to take her daughter to and from school, attend medical appointments, attend evening recovery classes, exercise, bathe, walk her dog, and help her daughter with homework. The claimant indicated she went out daily to appointments, classes, school, and shopping; spent time with others; had never been fired from a job due to inability to get along with others; and had no problems getting along with family, friends, neighbors, or authority figures. As of August 2008, claimant was exercising daily on a treadmill; involved in self-meditation; feeling better mentally using supplements; and teaching a wellness class at Seattle Mental Health as a co-facilitator.

(AR 15-17; internal citations to record omitted.) After summarizing the medical opinions, the ALJ concluded that plaintiff was capable of unskilled work and that, while she did have some mental limitations, the objective medical record did not support the limitations alleged. (AR 17.)

Plaintiff argues that the ALJ failed to supply clear and convincing reasons for rejecting her testimony. She first takes issue with the ALJ's reliance on the fact that she was not in therapy, pointing to reasoning from the Ninth Circuit: "[I]t is common knowledge that depression is one of the most underreported illnesses in the country because those afflicted often do not recognize that their condition reflects a potentially serious mental illness."; "'[I]t is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.'" *Van Nguyen v. Chater* 100 F.3d 1462 (9th Cir. 1996) (quoting *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989)). Plaintiff notes that Dr. Moore did not find the absence of therapy to undermine her credibility, that it is unclear why she was not receiving therapy, and that she was receiving treatment from her treating physicians.

Plaintiff next criticizes the ALJ's comments with respect to her work attempts. She

notes her explanation during the hearing that the statement from her boss probably occurred "on one good weekend" and reflected her excitement about receiving good feedback, and that the ALJ failed to take note of the fact that she was fired from that job after only three months due to her failure to follow closing procedures. (AR 34, 48.) Plaintiff clarifies that she volunteered as a teacher's assistant, not a teacher, and avers a lack of any evidence to contradict her testimony that she could not successfully perform in that position. (AR 35-36.)

Plaintiff asserts that the observation that her "stressors were socioeconomic and family issues[]" (AR 16) does not negate her diagnosed depression and bipolar disorder, or her reactions to her stressors. She also takes issue with the ALJ's reliance on observations that she was "'doing well'" and had a stable mood, pointing to case law recognizing that periods of improvement are not inconsistent with disability. *See, e.g.*, *Lester*, 81 F.3d at 833 ("Occasional symptom-free periods - and even the sporadic ability to work - are not inconsistent with disability."); *Hutsell v. Massanari*, 259 F.3d 707, 712-13 (8th Cir. 2001) (finding Commissioner erred in relying "too heavily on indications in the medical record that [the claimant] was 'doing well,' 'because doing well for the purposes of a treatment program has no necessary relation to a claimant's ability to work or to her work-related functional capacity.'"; given continuing treatment and physicians' conclusions that the claimant's work skills were seriously deficient, "'doing well' as a chronic schizophrenic [was] not inconsistent with a finding of disability.") (internal citations omitted). Plaintiff also notes the recognition that "the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability. One does not need to be 'utterly incapacitated' in order

to be disabled." *Vertigan*, 260 F.3d at 1049 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("Many home activities are not easily transferable to . . . the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication.")) *See also Tackett v. Apfel*, 180 F.3d 1094, 1103 (9th Cir. 1999) (road trip to California not sufficient to counter physicians' opinions that claimant needed to shift positions every thirty minutes or so, where there was an absence of information as to his positioning in the car and the frequency and duration of rest stops).

Plaintiff appropriately criticizes the ALJ's statements regarding her bartending and teaching positions. The ALJ did not fully reflect plaintiff's testimony with respect to either position. (*See* AR 33-38, 48.) Of particular note is the fact that the ALJ relied on a single comment from a treatment note, while ignoring the uncontested testimony that plaintiff was fired from the job after three months due to her inability to perform. In fact, one month after the note reflecting the comment from her boss, plaintiff reported continued stress due to, in part, the bartending job. (AR 451-52.) However, as argued by the Commissioner, the ALJ's remaining reasons for the credibility assessment withstand scrutiny.

Plaintiff does not directly dispute the ALJ's finding that the record overall and the objective medical evidence do not support the alleged severity of her symptoms and limitations. "Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony." *Carmickle*, 533 F.3d at 1161.5 Also, an ALJ appropriately considers inconsistencies or contradictions between a claimant's statements and her activities of daily

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5 The ALJ's reliance on Dr. Chen's observation of plaintiff's improvement on Geodon, however, is undermined by the subsequent treatment notes from Dr. Bartels. (*See supra* at 16.)

living. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001); *Thomas*, 278 F.3d at 958-59. The activities relied on by the ALJ in this case, including taking and picking up plaintiff's daughter from school, attending appointments and classes, exercising, bathing, walking her dog, helping her daughter with homework, daily excursions for appointments and shopping, spending time with others, self-meditation, and co-facilitating a class, do not support a conclusion that the ALJ expected plaintiff to be "'utterly incapacitated.'" *Vertigan*, 260 F.3d at 1049.

Additionally, an ALJ appropriately considers an unexplained or inadequately explained failure to seek treatment or follow a prescribed course of treatment. *Tommasetti*, 533 F.3d at 1039 (ALJ permissibly inferred that the claimant's pain was not as disabling as alleged "in light of the fact that he did not seek an aggressive treatment program and did not seek an alternative or more-tailored treatment program after he stopped taking an effective medication due to mild side effects.") *See also* SSR 96-7p ("[T]he individual's statements may be less credible . . . if the medical reports or records show that the individual is not following the treatment as prescribed and there are no good reasons for this failure.") As conceded by plaintiff, there was no indication as to why she was not receiving therapy.

Given the existence of other valid reasons for the ALJ's decision, any error as it relates to plaintiff's bartending and teaching experiences can be deemed harmless. *Carmickle*, 533 F.3d at 1162-63. However, because the ALJ's credibility assessment may be implicated by reassessment of physicians' opinions, the ALJ should also reconsider plaintiff's credibility as necessary on remand.

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Step Four

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess her work-related abilities on a function-by-function basis, including a narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can do considering his or her limitations or restrictions on a regular and continuous basis, meaning eight hours a day, five days a week, or an equivalent work schedule. SSR 96-8p.

Plaintiff argues that the ALJ failed to follow the mandatory requirements of SSR 96-8p in determining her RFC. She asserts error in the failure to consider all of the medical opinions, by minimizing the opinions of Drs. Moore and Fisher and by rejecting the opinions of Drs. Chen and Bartels. Plaintiff also asserts that the ALJ erred in failing to consider the opinions of her therapists, "other sources" whose opinions must be considered, *see* 20 C.F.R. §§ 404.1513(a) and (e), 416.913(a) and (e), and SSR 06-03p. She points in particular to an April 3, 2008 assessment noting the continuation of her depressive symptoms and a recent breast cancer diagnosis. (AR 446-49; *see also* AR 215-34, 453.) Finally, plaintiff notes multiple references in the record to her inability to react appropriately to change or stress (*see* AR 231, 310, 314), and asserts that the ALJ failed to properly address the issue of stress, contrary to SSR 85-15 (discussing association between stress and mental illness and stating: "Any impairment-related limitations created by an individual's response to demands of work, however, must be reflected in the RFC assessment.")

Because the ALJ erred in his assessment of the opinions of Drs. Moore, Fisher, and Bartels, the RFC assessment may be implicated and should be reassessed as needed on remand. This reassessment would include opinions reflecting limitations related to stress. Plaintiff

does not otherwise, however, establish that the ALJ erred in relation to the consideration of the issue of stress.

Plaintiff's argument as it relates to the consideration of opinions from other sources is less clear. The Commissioner notes that the ALJ cited the majority of records highlighted by plaintiff here. (*See* AR 11-13 and Dkt. 13 at 19.) He does not address the April 2008 assessment specifically discussed by plaintiff. The strength of plaintiff's argument is unclear given the lack of details provided. She fails to discuss, for example, the identities of the other sources at issue and the nature and length of her relationships with those individuals. Also, as noted by the Commissioner, it does appear that the ALJ considered many of the records at issue. In any event, because this matter should be remanded for the reasons described above, the ALJ should also consider whether the record contains opinions from other sources that must be considered.

Step Five

Plaintiff argues that, given the deficient RFC, the ALJ's hypothetical to the vocational expert (VE) and her resulting step five decision, relying on the VE's testimony, lacks the support of substantial evidence. *Lewis v. Apfel*, 236 F.3d 503, 517-18 (9th Cir. 2001) ("Hypothetical questions asked of the vocational expert must 'set out all of the claimant's impairments.' If the record does not support the assumptions in the hypothetical, the vocational expert's opinion has no evidentiary value.") (quoting *Gamer v. Secretary of Health and Human Servs.*, 815 F.2d 1275, 1278-79 (9th Cir. 1987)). Plaintiff also asserts error in that the VE did not identify the number of jobs available by region. 20 C.F.R. § 404.1560(c)(1) ("Any other work (jobs) that you can adjust to must exist in significant numbers in the national

economy (either in the region where you live or in several regions in the country)."); 20 C.F.R. § 404.1566(a) ("We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country."); SSR 83-14 (where a "vocational resource is used" the ALJ's decision must include, *inter alia*, "a statement of the incidence of such work in the region in which the individual resides or in several regions of the country."); SSR 83-12 (same).

As with the ALJ's step four decision, the deficiencies discussed above may implicate the ALJ's step five decision. The ALJ should, therefore, reconsider this step as necessary on remand.

The Commissioner concedes error in the failure to identify regional job numbers, but maintains that it was harmless given the vast numbers of the identified jobs nationally, including over 1,000,000 janitor jobs and "well over" 100,000 production assembler jobs. (AR 51-52.) None of the case law cited by the Commissioner directly supports this proposition. *See Desrosiers v. Secretary of Health & Human Services*, 846 F.2d 573, 577-78 (9th Cir. 1988) (Pregerson, J., concurring) ("The 'other work' must be available in the national economy in 'significant numbers,' but the opportunities may lie either in the region where the claimant lives or in several other regions in the country[.]") (quoting and citing 20 C.F.R. §§ 404.1560(b)(3) and 404.1566(a)); *Martinez v. Heckler*, 807 F.2d 771, 774-75 (9th Cir. 1987) (3,750 to 4,250 jobs in greater metropolitan Los Angeles and Orange County identified). While it is not clear whether this omission standing alone would constitute reversible error, the ALJ in this case, on remand, should include regional job numbers at step five.

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CONCLUSION

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings. A proposed order accompanies this Report and Recommendation.

DATED this 4th day of June, 2010.

Mary Alice Theiler
United States Magistrate Judge